DATE: January 16, 1998

CASE NO: 95-INA-389

In the Matter of

UNITED INSURANCE COMPANY OF AMERICA
Employer

on behalf of

MOHAMED A. JALLOH
Alien

Appearances: Tushinde C. Cooper,
Agent for Employer

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from United Insurance Company of America's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 7, 1994, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Maryland Department of Economic and Employment Development ("MDEED") on behalf of the Alien, Mohamed Jalloh. (AF 130-133). The job opportunity was listed as "Account Rep., Sales Manager". The job duties were described as follows:

> Identify and solicit prospects for life and health, insurance in Washington, D.C. and Maryland as well as fire insurance in D.C. Develop a broad base of clients for United Insurance's products particularly among African immigrants in Washington metro area. Maintain and expand an agency servicing the Washington metro aera (sic), such services to include responding to client's questions, requests for specific forms, collect premiums on insurance policies on due date, maintain daily and weekly accounts of clients, process changes in client's policies. Qualify prospects for life, health and fire insurance, using criteria set up by United Insurance. Development of insurance product to projected needs and marketing of designed insurance products to prospective clients.

(AF 130).

The stated job requirements for the position, as set forth on the application, included 2 years of college in the field of business and 2 years experience in the job offered or 2 years in the related occupation of "Director of Insurance Company". Special requirements included insurance licences in the State of Maryland and District of Columbia. (Id.).

The Employer advertised the position and three applicants applied. None of the applicants were hired because they failed a career profile exam. (AF 142). MDEED transmitted the file to the CO. (AF 127).

The CO issued a Notice of Findings ("NOF") on September 1, 1994, proposing to deny the certification for the following reasons: 1) The wage offered is based on commissions, bonuses, and

other incentives in violation of Section 656.20(c)(3); 2) The requirements of the job are not the actual minimum requirements in violation of Section 656.21(b)(5); and 3) U.S. applicants were rejected for other than lawful job-related reasons in violation of Sections 656.21(b)(6) and Section 656.20(c)(8). The CO found that the Employer's rejection of three applicants because they failed a career profile exam is not a lawful job-related reason. Passage of the exam is not a stated requirement on Form ETA 750, Part A. In addition, there is no evidence that the alien was required to pass the exam as a condition of employment.

The Employer submitted its rebuttal on October 11, 1994, which included a letter from the Employer's agent. (AF 109-129). The Employer's agent stated:

> The alien was required by the employer to take the Advanced Career Profile exam as a condition for employment with the company. The alien did in fact pass the Advanced Career Profile exam on November 1, 1993.[1]... The Advanced Career Profile exam is an insurance industry research-based questionnaire designed to assess the potential for continued success in a financial services sales career. The Advanced Career Profile is specifically designed for candidates who have had any full time insurance sales experience in the past five years ... According to the employer this exam is similar to the SAT, GRE, LSAT or GMAT .... The use of the Advanced Career Profile questionnaire in the pre-appointment phase of recruitment of insurance sales agents is very common in the insurance industry.

(AF 110-111).

In addition, the agent stated that the Employer was willing to modify Form ETA 750, Part A to include passing the Advanced Career Profile questionnaire as a requirement for the position. (AF 111).

The CO issued a second NOF on October 27, 1994 proposing to deny certification for the following reasons: 1) Passage of the Advanced Career Profile Questionnaire ("CPQ") is an unduly restrictive job requirement in violation of Section 656.21(b)(2). The CO found that the CPQ exam is an unduly restrictive requirement because it was used as a screening device for U.S. workers. The CO indicated that the Employer could rebut this finding by submitting evidence establishing a business necessity for the requirement or by eliminating it; and 2) Three U.S. applicants were not rejected solely for lawful job-related reasons. The CO found that:

> [E]ven the name, Advanced Career Profile Questionnaire, implies that the exercise is simply that, a questionnaire, rather than an exam which measures one's ability to perform the job. In addition, Page 1 of the introduction states, **"there are no right**

---

[1]The Employer included a letter, from its District Manager, Mark H. Strichartz, which stated: "On November 1, 1993 the test was taken and he received a "B", which is a passing score. (AF 118). The Employer also submitted a copy of the alien's test results which listed a "Career Profile Rating: B". (AF 119).

> **or wrong answers."** Therefore, there should be no pass or fail. The questionnaire simply measures one's odds for success, compared with candidates with similar levels of experience. No where is there any mention of the relevance of the questionnaire to one's ability to perform the job.

(AF 108). (emphasis in original).

The Employer submitted its rebuttal on December 1, 1994. (AF 44-105). The Employer's agent argued that there is a business necessity for the CPQ test. The agent stated:

> The use of the Advanced Career Profile Questionnaire (CPQ) has a direct impact on the participating company's investment of time and money in recruiting applicants for jobs in insurance sales. This is because the Career Profile rating resulting from the use of the CPQ provides employers with an assessment of the risk they take when they contract a given individual as an insurance agent.... since a high rating on the CPQ indicates that other employers have been successful when they contracted individuals similar to the one under consideration, and a low rating indicates the reverse, the requirement is essential to identifying candidates with probable superior ability to perform the job.

(AF 44-45).

The Employer's agent also argued that Section 656.21(b)(2) does not require the Employer to both establish a business necessity and establish that the job requirement is normally required for performance of the job in the U.S. The Employer's agent stated that the CPQ test is given to all applicants by the Employer.

The CO issued a Final Determination ("FD") on January 12, 1995, denying certification. (AF 39-43). The CO found that passage of the Advanced Career Profile exam was an unduly restrictive requirement. The CO found that the requirement had a reasonable relationship to the position, but it was not essential to the performance of the job duties. In addition, the CO found that the Employer rejected three U.S. applicants for failing to pass the career profile questionnaire which was not a lawful job-related reason.

On February 16, 1995, the Employer filed a timely Request for Review. (AF 1-38).

Discussion

The CO found that three U.S. applicants were not rejected solely for lawful job-related reasons in violation of Section 656.21(b)(6). The CO found that rejecting the applicants for failing to pass the CPQ test was not a lawful job-related reason. The CO noted that since the test materials state that there are no right or wrong answers, there should not be a pass or fail grade.

Section 656.21(b)(6) states that the employer is required to document that U.S. applicants were rejected solely for lawful job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. Daniel Costiuc, 94-INA-541 (Feb 23, 1996); H.C. LaMarch Ent., Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. A U.S. applicant is considered qualified for a job if the applicant meets the minimum requirements specified for that job in the labor certification application. Microbilt Corp., 87-INA-635 (Jan. 12, 1988).

An employer may use a test or questionnaire to ascertain the extent of an applicant's claimed experience. South of France Restaurant, 89-INA-68 (Mar. 26, 1990). The Board in Lee & Family Leather Fashions, Inc., 93-INA-50 (Dec. 21, 1994), stated that:

> [A] pre-employment test designed to aid an employer in the subjective determination of whether an applicant is able to perform the core job duties, ... may be a valid interview tool. However, such a subjective determination, because of its potential for abuse, is suspect and must be supported by specific facts which are sufficient to provide an objective, detailed basis for concluding that the applicant could not perform the core job duties. A subjective reason for rejecting a U.S. applicant is not necessarily unlawful — it is the failure to document how the interviewer came to that subjective conclusion that makes subjective reasons for rejection objectionable.

Here, the CPQ test is not being used to assess whether an applicant has the required level of experience. The Employer never indicated that the experience level of the U.S. applicants was in question. The Employer failed to provide copies of the applicants resumes'. Instead, the Employer is using the test to determine an applicant's probability of success in the position by comparing the applicants responses with the responses of successful insurance agents.[2] Such a subjective use by the Employer, requires that we scrutinize how the Employer applied the test.

We agree with the CO that the Employer failed to establish that it rejected the three U.S. workers solely for lawful job-related reasons. The bare statement by the Employer that the applicants failed the exam is suspect. The test materials indicate that there are no right or wrong answers. (AF 52). The Employer, in its rebuttal, failed to respond to the CO's concern about how someone could fail the test.[3] The Employer failed to submit copies of the applicant's exam results. Since the

---

[2]It appears that the Employer only submitted a partial copy of the CPQ test. The Employer submitted six questions, but the reliability studies appear to indicate that there are 183 questions. (AF 54, 99-105).

[3]In addition, the statements by the Employer's agent regarding why the Employer used the CPQ test are not supported by the record. It is well settled that assertions of an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts

Employer stated that the applicants failed the test, it appears that the Employer applied the CPQ test in a subjective manner by using its own unstated pass/fail cut-off to reject the applicants. The Employer failed to demonstrate a lawful job-related reason why it rejected the three U.S. applicants. See, e.g., Lee & Family Leather Fashions, Inc., supra.

Since the Employer has failed to demonstrate that the U.S. applicants were rejected solely for lawful job-related reasons, it is not necessary to address the issue whether the use of the Career Profile Questionnaire test was an unduly restrictive requirement.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

_____

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California

do not constitute evidence. Wilton Stationers, Inc., 94-INA-232 (Apr. 20, 1995); Moda Lines, Inc., 90-INA-424 (Dec. 11, 1991); Mr. and Mrs. Elias Ruiz, 90-INA-446 (Dec. 9, 1991).